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No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

YOUNG BROTHERS INC., CONTRACTORS,

Petitioner

— VS. —

UNITED STATES OF AMERICA

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the due process clause and/or this Court's supervisory powers bars the affirmance of a conviction by a Court of Appeals where that Court of Appeals misstates and mischaracterizes facts of record and fails to apply the actual facts of record to the applicable legal standard?

2. Whether the grand jury testimony of two witnesses, both of whom were unavailable under Rule 804 (a) (1), Federal Rules of Evidence, constitutes as a matter of law "former testimony" within the meaning of Rule 804 (b) (1), Federal Rules of Evidence?

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OPINION BELOW

On March 19, 1984, the initial opinion was delivered by a panel of the Fifth Circuit. *See* Appendix 1, *infra*. That opinion was corrected on April 23, 1984, *see* Appendix 3, *infra*, apparently due to the pendency of Appellant's motion for rehearing (panel and en banc) and the Government's concern about the opinion's factual inaccuracies. *See* Appendix 2, *infra*. The original panel opinion was further corrected on May 3, 1984. *See* Appendix 5, *infra*. On May 21, 1984, additional corrections were made in connection with the denial of Appellant's motions for rehearing. *See* Appendix 6, *infra*. The panel opinion, with one of the corrections, is reported at 728 F.2d 682.

JURISDICTION

On March 19, 1984, the opinion below was delivered. That decision affirmed the conviction of petitioner. On May 21, 1984, petitioner's motion for rehearing and suggestion for rehearing en banc were overruled and the original opinion modified. Pursuant to Rule 20.1 and 20.4 of this Court's rules, the petition is due to be filed on or before July 20, 1984. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V: No person . . . shall be . . . deprived of life, liberty, or property, without due process of law . . .

Rule 804. Hearsay Exceptions; Declarant Unavailable.

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant —

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of his statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b) (2), (3) or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exception, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

* * *

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare

to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

STATEMENT OF THE CASE

1. On November 20, 1981, the Appellant, John W. Miller, and Brannon Contractors, Inc., were indicted for conspiracy in restraint of trade [count one], and of mail fraud [counts two and three]. [Record on Appeal, Volume 3 at page 611-618 (hereinafter refered to as _____ R. _____)].

A three count indictment, substantially identical to the above indictment, was returned against Francis M. Young on March 19, 1982. 2 R. 397.

On November 8, 1982, the Appellant, John W. Miller, and Francis M. Young were put to trial[1] on the above indictments. 2 R. 382; 6 R. 1 *et seq.* Essentially, the case was a "bidrigging" case involving a highway construction project in Texas.

2. During the government's case-in-chief, W.J. Brannon, the government's primary witness, testified that he also contacted a Mr. Schwope (Schwope, Inc.) and a Mr. Keith Keller (Allen Keller Company). 8 R. 481. *See* Govt. Exs. 2, 24, and 51. According to Brannon, an agreement was reached whereby neither Schwope, Inc., nor Allen Keller Company would submit a competitive bid on the Gillespie County project. 8 R. 481. Rather, it was allegedly agreed that both Schwope, Inc., and Allen Keller Company would submit a non-competitive, complimentary bid to ensure that Brannon was the low bidder on the project. 8 R. 481.

Neither Mr. Schwope nor Mr. Keith Keller were specifically named in the indictment(s) as co-conspirators. *See* 1 R. 128, 135; 3 R. 612. Furthermore, although the Appellant's motion for a bill of particulars requested the identity of "any co-defendants or co-conspirators not named in the indictment," 3 R. 538 at 539, the government opposed the motion, 2 R. 461 at 465, and the Court did not order the government to supply a list of co-conspirators. *See* 16 R. 54-58, 89-90. However, at final argument

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[1]Brannon Contractors, Inc., had previously entered a plea of guilty to the indictment in exchange for certain concessions to W.J. Brannon, Sr., and Waylon Brannon, Jr.

the prosecutor essentially admitted that Keller and Schwope were co-conspirators. 12 R. 1246-1247.

During the defendant's case, a hearing was held outside the presence of the jury and in chambers to determine whether the Appellant could introduce the grand jury testimony of Keith Allen Keller and James Kemp, employees of Allen Keller Company. 11 R. 1119-1131. The grand jury testimony of Keller and Kemp, proffered at that time (and contained in a sealed envelope in the office of the Clerk of the Fifth Circuit), reflects that: (1) Keller and Kemp were employees of Allen Keller Company as of June 1977; (2) Allen Keller Company submitted a bid on the Gillespie County project; (3) neither Keller nor Kemp had a discussion with W.J. Brannon concerning rigging the bid on the Gillespie County project; and (4) no bid figure was given to either of them by either of the Brannons.[2]

The defense attorneys, again in chambers, submitted the grand jury testimony under Rule 804 (b) (1), F.R.E. 11 R. 1119. The government objected to the proposed offer by initially stating that Rule 804 (b) (1) did not include a witness who was unavailable due to an invocation of his fifth amendment privilege. 11 R. 1120-1122. Defense counsel countered that response and the government then took the position that it had not had a sufficient opportunity to examine Keller and Kemp while they were grand jury witnesses. 11 R. 1122-1123. The Court then stated, "I don't believe the rule is speaking to privilege with regard to privilege against self-incrimination." 11 R. 1123, L. 6-8. Due to that statement by the Court, the defense attorneys attempted to perfect a bill on the subject. 11 R. 1123.

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[2]The grand jury testimony of Keller and Kemp was offered by the Appellant to substantiate its defensive theory that it had not entered into any agreement with Brannon and had no intention to defraud the State of Texas. The exclusion of Keller's and Kemp's grand jury testimony was harmful to the Appellant's defense. Since it is clear that Brannon could not have *actually* rigged the bid without eliminating all potential bidders, the grand jury testimony would have provided evidence to substantiate the defense posture that the *Appellant* had not entered into an agreement with Brannon and had no intent to defraud anyone. In other words, unless all bidders agreed to refrain from competitively bidding, the bid could not be rigged in Brannon's favor and no scheme to defraud could have existed. It also would have impeached Brannon's testimony on these points.

While one defense attorney went to get the attorneys who represented Keller and Kemp (both of whom were present), the relevant portions of the grand jury testimony were marked and proffered. 11 R. 1123-1124. Thereafter, Mr. Van Osslaer, attorney for Keller and Kemp, was brought into chambers and he testified, *inter alia*, that both Keller and Kemp would claim their fifth amendment privilege against self-incrimination if called by the Appellant to testify before the jury. 11 R. 1124-1127. During Van Osslaer's testimony, the government stipulated that both Keller and Kemp appeared before the grand jury and denied any knowledge of any type of bid rigging on the Gillespie County project and in the State of Texas. 11 R. 1127.

The defense, still in chambers, then specifically requested the Court to permit it to read portions of the grand jury testimony to the jury, based on the unavailability of the witnesses. 11 R. 1127-1129. The government again objected on the basis that the rule did not encompass a witness who claimed his fifth amendment privilege. 11 R. 1128-1129. After additional comments, the government stipulated that Keller and Kemp would assert their fifth amendment privilege if called to testify. 11 R. 1129-1131. The Court then stated: "The stipulation is in the record so stipulated. We don't need the witnesses anymore." 11 R. 1131, L. 2-3.

The noon recess was then taken. 11 R. 1131. Thereafter, an additional colloquy was held, outside the jury's presence, regarding whether the Court would honor the invocation of the fifth amendment privilege by Keller and Kemp, give them immunity, and order them to testify or excuse them from testifying. 11 R. 1136-1139. During that conference, the government took the position, at least implicitly, that Keller and Kemp both had a valid fifth amendment privilege and that the Court could not order them to testify. 11 R. 1138. The Court agreed with the government. 11 R. 1138, L. 20-22. *See also* 11 R. 1122, L. 10-16.

3. The jury ultimately returned a verdict acquitting Miller and Young on all three counts, 12 R. 1305-1306, but finding the Appellant guilty on all three counts. 1 R. 110; 13 R. 1305.

On March 18, 1983, the Appellant was sentenced and assessed a fine in the amount of $750,000.00 on count one, and $1,000.00 each on counts two and three. 1 R. 5. Notice of appeal was timely filed on March 23, 1983. 1 R. 2-4. Jurisdiction in the

Court of Appeals was pursuant to Rule 4 (b), Federal Rules of Appellate Procedure, and 28 U.S.C. §1291.

4. Included within Appellant's opening brief was GROUND OF ERROR NO. 4. Appellant's Brief at 31-38. That GROUND OF ERROR alleged that the trial court committed reversible error by refusing to permit the Appellant to introduce the grand jury testimony of two witnesses (Keller and Kemp) pursuant to Rule 804 (b) (1), Federal Rules of Evidence (F.R.E.).

a. On March 19, 1984, a panel of the Fifth Circuit delivered its initial opinion in the instant cause. *See* Appendix 1, *infra*. At pages 15-20 of that opinion, the panel addressed GROUND OF ERROR NO. 4 and held that although the witnesses were "unavailable" within the meaning of Rule 804 (a) (1), F.R.E., the panel need not decide whether their grand jury testimony constituted "former testimony" within the definition of Rule 804 (b) (1), F.R.E., since even if it was, the exclusion was harmless error.

In reaching its conclusion of harmless error, the panel initially stated that the Appellant's contention was as follows:

> "Appellant argues that the exclusion of the grand jury testimony was harmful on the theory that Brannon could not have actually rigged the bid without eliminating all potential bidders. Therefore, the grand jury testimony would have provided evidence to substantiate appellant's defense posture that it had not entered into an agreement with Brannon and had no intention to defraud the State." Appendix 1 at 13, *infra*.

The panel then stated:

> "We reject this argument for several reasons. First, it is of great significance that the basic purport of the Keller and Kemp testimony was before the jury anyhow. The government stipulated that Kemp and Keller had appeared before the grand jury and had denied any knowledge of or participation in any type of bidrigging scheme. Second, the district court instructed the jury that since both Kemp and Keller denied participation in the bidrigging scheme, the jury was free to infer that such a scheme did not exist. This instruction was given in keeping with the appellant's right 'to have [its] theory of the case, if it could amount to a

lawful defense, fairly submitted to the consideration of the jury.' *United States v. Flom, supra,* 558 F.2d at 1184. Most important, the evidence undisputedly showed that notwithstanding any participation by Kemp and Keller, appellant made an agreement with Brannon to submit a non-competitive bid and in return received $10,001. The evidence surely was sufficient for the jury reasonably to conclude that appellant participated in the bidrigging scheme even if the members of the jury were not convinced that Kemp and Keller had also participated." Appendix 1 at 14, *infra.*

b. On or about March 30, 1984, the Appellant filed its motion for panel rehearing and suggestion for rehearing en banc. Included therein was an assertion that the panel was factually inaccurate as to the first two reasons in support of its assertion of harmless error. As to the first such reason, the record did not reflect that the "basic purport" of the testimony of Keller and Kemp was *before the jury*. The stipulation referred to by the panel occurred OUTSIDE the presence of the jury and in chambers only. 11 R. 1127. As to the second such reason, the district court's charge, 12 R. 1249-1283, *did not* contain an instruction to the effect that " . . . since both Keller and Kemp denied participation in the bidrigging scheme, the jury was free to infer that such a scheme did not exist."

c. On April 5, 1984, the government wrote to the Clerk of the Fifth Circuit concerning the above factual inaccuracies and agreed with the Appellant that neither of the factual statements were supported by the record. *See* Appendix 2, *infra.*

d. On April 23, 1984, the panel issued corrections to the opinion. *See* Appendix 3, *infra.* However, as pointed out by the Appellant on April 24, 1984, *see* Appendix 4, *infra,* those corrections resulted in a nonsensical paragraph and failed to eliminate the gross factual inaccuracies pointed out in Appellant's motion for rehearing. Accordingly, on May 3, 1984, further corrections were made so that the paragraph rejecting Appellant's assertion of harm from the exclusion read as follows:

"We reject this argument. First, the government stipulated that Kemp and Keller had appeared before the grand jury and had denied any knowledge of or participation in any

type of bidrigging scheme. Second, the district court instructed the jury on appellant's defensive theory—'that none of [the defendants] knowingly or willfully entered into any agreement or any scheme or artifice to defraud the State of Texas' or 'to submit collusive, non-competitive highway construction bids.' This instruction was given in keeping with the appellant's right 'to have [its] theory of the case, if it could amount to a lawful defense, fairly submitted to the consideration of the jury.' *United States v. Flom, supra*, 558 F.2d at 1185. Most important, the evidence undisputedly showed that notwithstanding any participation or nonparticipation by Kemp and Keller, appellant made an agreement with Brannon to submit a noncompetitive bid and in return received $10,001. The evidence surely was sufficient for the jury reasonably to conclude that appellant participated in the bidrigging scheme even if the members of the jury were not convinced that Kemp and Keller had also participated. The admission of grand jury testimony under Rule 804 (b) (1) is a difficult question even when there is no confrontation issue. We do not go out of our way to decide it since in this case if there was error it was harmless.[11] [footnote omitted in this printing.]" *See* Appendix 5, *infra*.

e. Thereafter, on May 21, 1984, the panel denied the motion for rehearing, the Court denied the suggestion for en banc consideration of the issue of whether grand jury testimony is "former testimony" within Rule 804 (b) (1), F.R.E., and an additional correction to the opinion was made. *See* Appendix 6, *infra*.

REASONS FOR GRANTING THE WRIT

1. THE DUE PROCESS CLAUSE BARS AN AFFIRMANCE BASED ON FACTS NOT OF RECORD.

The original panel opinion affirmed the Appellant's conviction by holding that the exclusion of the grand jury testimony, if error, was harmless. Three reasons in support of harmless error were proffered. The Appellant and the government both pointed out that two of those three reasons were not supported by the record.

The panel subsequently "corrected" its opinion three times. The final pronouncement regarding harmless error states, in part, that:

> "We reject this argument. First, the government stipulated the Kemp and Keller had appeared before the grand jury and had denied any knowledge of or participation in any type of bidrigging scheme." Appendix 6, *infra.*

The panel's language correctly cites what occurred *in chambers*, but implies that it occurred before the jury. Indeed, the clear implication is that the exclusion was harmless because the jury was aware of the basic purport of the testimony. Otherwise, the foregoing language would have no bearing on the harmless error determination.[3] Thus, despite the purported corrections, the panel has maintained as its first reason a fact which, given the context in which it is utilized, is not supported by the record. Since both the Appellant and the government notified the panel that the stipulation was only in chambers and that the jury was never apprised of the stipulation, the panel's failure to eliminate the stipulation as one of the facts relevant to its determination of harmless error cannot be dismissed as anything except a departure from the accepted and usual course of judicial proceedings.

It is well established that the due process clause of the Fifth Amendment requires proof beyond a reasonable doubt as to every fact necessary to the commission of a crime. *In Re Winship*, 397 U.S. 358 (1970); *Jackson v. Virginia*, 443 U.S. 307 (1979). When the *facts of record* do not permit any rational trier

[3]Indeed, if the jury had been aware of the basic purport of the grand jury testimony the exclusion of that grand jury testimony would not have been alleged as error.

of facts to find guilt beyond a reasonable doubt, a conviction must be reversed. *Jackson v. Virginia, supra.*

Regardless of the exact function and nature of the Courts of Appeals, it is undeniable that they are subject to the Fifth Amendment. The due process clause prevents a Court of Appeals from creating facts not of record in order to conclude that any rational trier of fact could have found guilt beyond a reasonable doubt. Similarily, the due process clause prevents or should prevent a Court of Appeals from misstatements and mischaracterizations of fact which allow it to affirm a conviction.

2. THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWERS TO PREVENT A GRAVE DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

In addition to the panel's misstatement and mischaracterization of the stipulation, the panel failed to identify which standard of harmless error it was applying. *Cf. United States v. Gonzales,* 700 F.2d 196, 202 n. 4 (5th Cir. 1983).[4] The panel's misstatement and mischaracterization of the stipulation and its failure to identify the standard of harmless error and apply the facts thereto are matters properly within the scope of this Court's supervisory powers. One of the purposes underlying the supervisory powers of federal courts and of this Court is to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury. *McNabb v. United States,* 318 U.S. 332, 345 (1943); *United States v. Hasting,* 461 U.S. _____, 76 L.Ed.2d 96 at 104 (1983). Similarly, this Court has utilized its supervisory powers to ensure that the Courts of Appeals do not depart from the accepted and usual course of judicial proceedings. *Cf. Marshall v. United States,* 360 U.S. 310 (1959); *McNabb v. United States, supra.* It is beyond question that it is not an accepted and usual course for a Court of Appeals to misstate and mischaracterize the evidence or to fail to identify the appropriate legal standard and apply

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[4]In *Gonzales,* the Court noted that two standards have been applied in the Fifth Circuit: (1) Harmless beyond a reasonable doubt; and (2) "Substantial influence." *Cf. United States v. Hasting,* 461 U.S. _____, 76 L.Ed. 2d 96 at 105-108 (1983).

the facts thereto. This Court should exercise its supervisory powers to remedy the panel's gross departure from the accepted and usual course of judicial proceedings.

3. THE ISSUE OF WHETHER GRAND JURY TESTIMONY CONSTITUTES "FORMER TESTIMONY" WITHIN THE MEANING OF RULE 804 (b) (1), FEDERAL RULES OF EVIDENCE, IS A QUESTION OF EXCEPTIONAL IMPORTANCE.

When a witness who has testified before a grand jury is "unavailable" at trial, the government can attempt to introduce that witness' grand jury testimony at trial under Rule 804 (b) (5), Federal Rules of Evidence. *See* cases cited at Appendix 1 at 14 n. 11. The government cannot attempt to introduce the grand jury testimony under Rule 804 (b) (1), Federal Rules of Evidence, due to the confrontation requirement contained therein.

On the other hand, a defendant who receives or is aware of grand jury testimony of an "unavailable" witness - usually pursuant to the prosecutor's obligation under *Brady v. Maryland*, 373 U.S. 83 (1963) (as in the present case) - can attempt to introduce that witness' grand jury testimony at trial under Rule 804 (b) (1) or, if grand jury testimony is not "former testimony", under Rule 804 (b) (5). Resolution of whether grand jury testimony is "former testimony" is particularly pertinent to the issue of whether Rule 804 (b) (5) is available inasmuch as Rule 804 (b) (5) expressly refers to "a statement not specifically covered by" Rule 804 (b) (5). That is, Rule 804 (b) (5) is not available unless grand jury testimony is not "former testimony" within the meaning of Rule 804 (b) (1) and Rule 804 (b) (1) is not available unless grand jury testimony is "former testimony."

Resolution of this issue is particularly significant to the government inasmuch as a decision that grand jury testimony is "former testimony" will undoubtedly affect the manner by which prosecutors conduct examinations of witnesses before grand juries. Furthermore, significant constitutional rights are involved, such as the Sixth Amendment right to present a defense and to compulsory process of witnesses. In the present case, for instance, the Appellant was deprived of presenting to the jury evidence which the government impliedly conceded was excul-

patory by virtue of its production to the Appellant under *Brady v. Maryland, supra.*

Admittedly, there is little case law addressing the issue. *See United States v. Klauber,* 611 F.2d 512, 513-517 (4th Cir. 1979); *United States v. Henry,* 448 F.Supp. 819, 821-822 (D. New Jersey 1978); *United States v. Driscoll,* 445 F.Supp. 864, 866 (D. New Jersey 1978).[5] *Cf. United States v. Pelton,* 578 F.2d 701, 708-710 (8th Cir. 1978). The relative dearth of case law, however, does not diminish the importance of the issue. Rather, it merely serves to illustrate that it is a rare situation when a witness who exculpated a defendant during his grand jury testimony is unavailable at trial.

Indeed, a review of the above cited cases supports the proposition that grand jury testimony is "former testimony" within the meaning of Rule 805 (b) (1). In *United States v. Klauber, supra,* a situation somewhat similar to the present case arose. The defendant, an attorney, was charged with mail fraud and racketeering arising out of his law practice. During the grand jury investigation, Michael Simmons, a former associate in the defendant's law firm, testified before the grand jury under a grant of immunity. 611 F.2d 513.

At trial, the defendant attempted to force the government to grant Simmons immunity so that he could testify. The defendant asserted that Simmons could exculpate the defendant as well as impeach other government witnesses. The defendant's assertions were based on a statement by Simmons' attorney that Simmons, if called to testify, would assert the Fifth Amendment. 611 F.2d 514.

The Court, in assessing the defendant's assertion that Simmons should have been granted immunity at trial, noted that the defendant had not obtained the grand jury testimony of Simmons under either the Jencks Act, 18 U.S.C. §3500, (since the government did not call Simmons as a witness at trial) nor under *Brady v. Maryland, supra.* 611 F.2d 515.

The Court then noted that the defendant did not, at trial, seek a copy of Simmons' grand jury testimony *and* attempt to introduce it under Rule 804 (b) (1) " . . . as testimony by an unavailable declarant at another hearing in the same proceeding, at

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[5]The Panel opinion failed to cite or discuss any of the above cases.

which the government, as the party against whom the testimony would be offered, would have had an opportunity and similar motive to develop the testimony by direct examination." 611 F.2d at 516-517.

Thus, to a limited degree, *Klauber* supports the conclusion that grand jury testimony can constitute former testimony. Indeed, it is difficult if not impossible to conclude that grand jury testimony is not "testimony" at a prior or "former" proceeding.

In *United States v. Pelton, supra,* the defendant (Jacqueline Rich) attempted to introduce at trial the grand jury testimony of Kathleen Waggoner, a witness allegedly "unavailable" under Rule 804 (a) (1). *Id.*[6] The Court held that Rich had not sustained her burden as to Waggoner's "unavailability" under Rule 804 (a) (1). *Id.* at 709-710. Nevertheless, the Court implied that the grand jury testimony would have otherwise been admissible, although it did not expressly identify any rule in support thereof.

In *United States v. Henry, supra,* the Court dealt with whether grand jury testimony of a witness who was "unavailable" under Rule 804 (a) (1) could be offered at trial by a defendant who had obtained that grand jury testimony pursuant to discovery. The Court stated the following with regard to the admissibility of grand jury testimony under Rule 804 (b) (1):

> "Under the circumstances of this case, and without in any way implying any broad or general rule applicable in all instances, the court is satisfied that a defendant here may offer in evidence the Grand Jury testimony in question. It may be true that the Grand Jury proceeding dealt with more than the subject-matter of the present indictment and that, in fact, it may be continuing even now into other aspects. Even so, that much of it as dealt with the present indictment must be recognized as being "another hearing of the same . . . proceeding," because the hearsay would be offered against the United States, the same party which had

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Waggoner's grand jury testimony from her indictment, NOT from the government. *See Id.* at 701 n. 8.

After Waggoner's testimony before the grand jury, she was indicted for perjury before the grand jury. The indictment alleging the perjury set out verbatim portions of her grand jury testimony. *Id.* at 708. The defendant thus obtained Waggoner's grand jury testimony from her indictment, NOT from the government. *See Id.* at 701 n. 8.

an opportunity and similar motive to develop the testimony by direct examination.

* * *

However, while a defendant may offer the Grand Jury testimony under Fed.Ev.Rule 804 (b) (1), the Court does not now rule on admissibility. That is a matter to be decided when the offer in evidence is made, and may be controlled by considerations not now known." *Id.* at 821-822. (note omitted).

In *United States v. Driscoll, supra*, the defendants moved prior to trial for the production of the grand jury testimony of a co-conspirator, one Tecott, who had died after he had testified before the grand jury. *Id.* In ruling on the request the Court noted that Tecott was an "unavailable" declarant under Rule 804 (a) (4). The Court then stated:

"For these reasons, his former testimony before the Grand Jury becomes potentially admissible evidence, as an exception to the hearsay rule, under Fed.Ev.Rule 804 (b) (1).

Whether the testimony can be received at trial is a decision that must await trial; no advisory opinion on that score is within this court's jurisdiction. However, the potential is there.

The Grand Jury testimony of Tecott is 'testimony given as a witness at another hearing of the same . . . proceeding'. And the United States is a 'party against whom the testimony is offered', and 'had an opportunity and similar motive to develop the testimony by direct . . . examination,' thus satisfying, evidently, the conditions of Fed.Ev.Rule 804 (b) (1)." *Id.* at 866.

Of course, the Court in *Driscoll* also stated:

"Finally, it should be observed that the court has found no authority to indicate, one way or the other, whether the Grand Jury testimony of a deceased witness before that body (which named the deceased witness as an unindicted co-conspirator) is within the scope of the meaning of the

expression: 'Testimony given as a witness at another hearing of the same or a different proceeding . . . .' Fed.Ev. Rule 804 (b) (1).

Neither the Advisory Committee Notes, nor the House Report (No. 93 650), nor the Senate Report (No. 83 1277), nor the Conference Report (No. 93 1597) to what became P.L. 93 595, addresses this question. Certainly, the expression embraces testimony at a prior trial. Certainly, it embraces depositions taken in criminal cases, see F.R.Crim. P. 15, and 18 U.S.C. §3503. Whether or not the expression embraces testimony before a Grand Jury during the investigation stage eventually leading to indictment is by no means clear.

Despite this doubt, the court has arrived at its conclusion largely to assure that the defendants' constitutional right to the compulsory process of the court be realized to the extent it can be in the circumstances of this case."

Despite the relative absence of case law and the lack of legislative history bearing on the issue, the plain language of Rule 804 (b) (1) dictates that grand jury testimony is "former testimony". Even the government, in its appellate brief, did not attempt to persuade the panel that grand jury testimony is not "former testimony."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 18, 1984

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-1174

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

YOUNG BROTHERS, INC., CONTRACTORS,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

(MARCH 19, 1984)

Before BROWN, REAVLEY and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge.

Appellant, Young Brothers, Inc., Contractors,[1] was convicted by jury of violating § 1 of the Sherman Act, 15 U.S.C. § 1, by conspiring to submit collusive, non-competitive "rigged" contract bids for a state highway construction project and also of violating 18 U.S.C. § 1341 by using the mails to defraud in furtherance of the conspiracy. Appellant appeals the convictions, challenging (1) the sufficiency of the evidence; (2) the jury instructions; (3) the court's exclusion of certain grand jury tes-

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[1] Appellant is a corporation engaged in the highway construction business in Texas. At the time of the events involved in this case, Francis M. Young was the president of the corporation and John Miller was the vice-president.

timony; and (4) various evidentiary rulings. Finding no reversible error on any of these challenges, we affirm.

FACTS

Through a three-member Highway Commission, the State of Texas contracts with various firms to perform highway construction work. Texas law mandates that highway contracts be awarded on the basis of sealed competitive bids submitted by the various construction contractors. In June 1977, the Highway Department put up for bid a seal coat job to be completed on 63 miles of highway located primarily in Gillespie County, Texas.[2] The bids were to be received no later than 9:00 a.m. on June 23, 1977, at the Highway Department in Austin, Texas.

After the Texas Highway Department announced bidding on the Gillespie County job, Gerald Gold, president of Gold Paving Aggregate, Inc., a highway construction company, telephoned John Miller, appellant's vice president. Although Gold was interested in doing the Gillespie County job, he was not qualified to bid on it because at that time his company was primarily in the sand, gravel, and paving business. He therefore asked Miller if appellant corporation would agree to submit a bid and, if the bid was successful, to subcontract the work to Gold.[3] It was agreed that appellant would bid the job and that Gold would deliver his estimate to Miller in Austin the night before the bid deadline.

On the evening of June 22, Gold accordingly delivered a bid estimate to Miller. Gold's original estimate was approximately $410,000. When Miller indicated he thought the job would go somewhat higher, Gold responded that a bid in the $420,000 "range . . . was a good idea." Although no final figure was decided on at the meeting, the two men parted with the understanding that Miller would submit a bid for Gold. The bid actually submitted by appellant was $461,797.50, more than

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[2] A seal coat job involves the application of liquid asphalt on the road surface on top of which is placed a layer of either crushed rock, gravel, or stone. This process seals the road surface, preventing moisture from penetrating, and also may improve the skid characteristics of the road.

[3] The Texas Highway Department regulations did not prohibit successful bidders from subcontracting the projects to other contractors.

$9,000.00 above the low bid of $452,221.22 (submitted by Brannon Contractors, Inc.), and more than $50,000.00 above Gold's original estimate.

The evidence adduced at trial showed that the reason appellant submitted a bid so far above Gold's estimate was that, un known to Gold, appellant and others had "rigged" the bid. The bid submitted by appellant was a "complimentary bid" designed to deceive state officials into believing that the project had been bid competitively. This conspiracy was organized by W.J. Brannon, Sr., president of Brannon Contractors, Inc., and his son, W.J. Brannon, Jr.[4]

On June 21, 1977, the Brannons went to Austin. Using the Highway Department list of those who had requested bid proposals on the Gillespie County job, they spent the next day contacting the contractors on the list to determine whether they intended to bid on the Gillespie County project. Their objective was to "set up the job" by persuading potential bidders not to submit a bid or to submit a complimentary bid that was higher than the bid submitted by Brannon Contractors. After talking to some contractors who expressed no interest in bidding on the Gillespie County job, Brannon, Sr. spoke to Jack Schwope of Schwope, Inc., and Keith Keller of the Allen Keller Company. Both informed Brannon they intended to bid on the job. Brannon was able to persuade both Schwope and Keller not to turn in competitive bids, but instead to make complimentary bids so that Brannon Contractors would be assured of being the low bidder.

On the night before the bid deadline, Brannon, Sr. met with appellant's vice president, John Miller, in Miller's hotel room. Brannon informed Miller that he "had everyone off the job" and that he would "appreciate it" if Miller "would go along and not bid the job competitive." After Miller told Brannon he was under instructions from appellant's president, Francis Young, to place a competitive bid, Brannon asked Miller to telephone Young so that Brannon could talk to him. During the telephone conversation, Young informed Brannon that he was actually

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[4] Neither Miller nor Young testified at trial. Thus, most of the facts relating to the actual making of the bidrigging agreement were established to the satisfaction of the jury through the testimony of the Brannons.

bidding the job for Gold and that Young Brothers "needed to make some money" because it "hadn't had a whole lot of work." Young finally agreed not to bid the job competitively in return for $10,000. Young, without request from Brannon, added that he would like to turn in a complimentary bid. They agreed at that time that after Brannon was awarded the job, Young would send Brannon a bill for "rental equipment" and that the bill would be for ten thousand plus "some odd dollars."

The next morning, prior to the bid deadline, Brannon, Jr. contacted Miller, Schwope, and Keller and gave them the necessary complimentary bid figures. Schwope accordingly bid $471,498.00; appellant bid $461,797.50; Allen Keller bid $458,799.50; and Brannon bid $452,221.22. Brannon, the low bidder, was awarded the Gillespie County job. Brannon Contractors subsequently performed the work, earning a profit of $135,000.

After the job was awarded, on July 28, 1977, Brannon, Jr. called Miller at appellant's offices in Waco, Texas. Miller transferred Brannon's call to Oliver Rudolff, appellant's comptroller. While transferring the call, Miller advised Rudolff that Brannon wanted to give Rudolff billing instructions. Brannon, accordingly, instructed Rudolff to send him an invoice for $10,001. Brannon asked Rudolff to show on the invoice that the $10,001 was for the rental of equipment for use in constructing a sub-division in Victoria, Texas. Pursuant to Brannon's request, an invoice was prepared and mailed to Brannon Contractors on or about July 30, 1977. On August 10, 1977, after receiving the invoice, Brannon Contractors mailed a check made out to appellant for $10,001. The check was deposited in the appellant's bank account in the normal course of business. At no time did Brannon Contractors actually rent any equipment or receive any services from appellant for the Victoria sub division.

In a three-count indictment, appellant Young Brothers, Inc., Contractors, John W. Miller, appellant's vice president, Brannon Contractors, Inc., and various indicted co-conspirators were charged with (1) engaging in a conspiracy in violation of § 1 of the Sherman Act (15 U.S.C. § 1) (count one); and (2) using the United States mail in a scheme to defraud the State of Texas in violation of 18 U.S.C. § 1341 (counts two and three). Appel-

lant's president, Francis M. Young, was separately indicted for the same offenses. The indictments were subsequently consolidated for trial. Prior to the trial, the district court accepted a guilty plea from Brannon Contractors, Inc. to count one of the indictment and sentenced it to pay a fine of $200,000, later reduced to $150,000.[5] The jury returned verdicts of innocent on all counts with respect to defendants Miller and Young, and guilty on all counts with respect to appellant, Young Brothers. Appellant was sentenced to pay a $750,000 fine on count one and a $1,000 fine on each of counts two and three.

SUFFICIENCY OF THE EVIDENCE

Appellant argues that the evidence is insufficient to support its conviction unless the evidence excludes every reasonable hypothesis of innocence, presumably on the theory that if there is such a reasonable hypothesis the jury must have had a reasonable doubt of appellant's guilt. Specifically appellant contends that a reasonable hypothesis of innocence was not excluded by the evidence adduced at trial: that Miller and Young feigned agreement with the Brannons, disregarded the figure supplied by them, competitively bid the project to honor the pre-existing agreement with Gold, had no intention of approaching the Brannons for the $10,000, and were "amazed" when Brannon, Jr. arranged to pay the appellant.

Appellant has not stated the correct standard of review for sufficiency of the evidence. "It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." *United States v. Bell*, 678 F.2d 547, 594 (5th Cir. 1982) (en banc), *aff'd*, _____ U.S. _____, 103 S.Ct. 2398 (1983); *accord United States v. Sneed*, 705 F.2d 745, 749 (5th Cir. 1983); *United States v. Shaw*, 701 F.2d 367, 394

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[5] Pursuant to a plea bargaining agreement, counts two and three were dismissed against Brannon Contractors in exchange for its agreement to cooperate fully with the government's investigation of the Texas highway construction industry.

(5th Cir. 1983).[6] It is within the jury's province to choose among reasonable constructions of the evidence. As an appellate court, we must view the evidence in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80 (1942) and accept all credibility choices and reasonable inferences the jury could have made to support its verdict. We may reverse only upon concluding that a reasonable jury would have been compelled to find that guilt was not proved beyond a reasonable doubt. *United States v. Saxton*, 691 F.2d 712, 713 (5th Cir. 1982).

"Conspiracies between firms to submit collusive, non-competitive, rigged bids are *per se* violations" of the Sherman Act. *United States v. Flom*, 558 F.2d 1179, 1183 (5th Cir. 1977). In order to prove that appellant actually intended to enter into the bidrigging conspiracy, the government was required to show that appellant knowingly joined or participated in the conspiracy. *United States v. Cargo Service Stations, Inc.*, 657 F.2d 676, 681 (5th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982). Appellant argues that while the testimony of Brannon, Jr. and Brannon, Sr. reflected that they both were of the impression that Miller and Young had agreed to submit a non-competitive bid, this testimony alone was insufficient to show that appellant actually intended to participate in the conspiracy.

"Intent in antitrust cases, as in all cases, is a question to be resolved by the trier of fact after consideration of all the evidence." *Cromar Company v. Nuclear Materials & Equipment Corp.*, 543 F.2d 501, 511 (3d Cir. 1976). We find that the evidence in its entirety was sufficient for the jury reasonably to conclude that appellant intentionally and knowingly participated in the bidrigging conspiracy.

Brannon's uncontested testimony shows that Young at least

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[6] The standard for sufficiency of the evidence cited by the appellant was the standard formerly used by this Circuit in cases where the government's proof was based primarily upon circumstantial evidence. This Court no longer makes a distinction in the burden of proof required in cases based upon circumstantial evidence and those based upon direct evidence. The standard for testing sufficiency of the evidence which we cite in the test applies to either type of case. *See United States v. Bell, supra*, 678 F.2d at 549 n.3. In any event, it is clear that the government's proof in the instant case was based primarily upon direct testimony by those who participated in the bidrigging scheme.

overtly agreed with Brannon to submit a complimentary bid in return for just over $10,000, to be billed by appellant as rental equipment. The uncontroverted evidence also shows that on the morning of June 23, 1977, Brannon, Jr. gave Miller the necessary figure to turn in a complimentary bid. Appellant does not dispute that Brannon was actually the low bidder on the job. Finally, the record shows without dispute that appellant sent Brannon an invoice for $10,001 for a fictitious rental of equipment and that Brannon sent appellant a check for $10,001 which appellant deposited in its bank account.

Appellant presents several contentions to support its claim that Young and Miller merely feigned agreement with the Brannons and actually bid the job competitively. First, appellant maintains that the bid of $461,797.50 actually submitted by Miller was in line with Gold's original figure of $410,000 to $420,000, when appellant's 10% fee for bidding the job is added. However, the record shows that Gold testified that the figures he gave Miller included "what [Gold] thought it would take to do the job plus [appellant's] 10 percent fee," although Gold conceded on cross-examination that Miller may have been unclear on this point. The record also shows that Miller and Gold together went over Gold's estimate on the bid items.

Second, appellant contends the evidence shows that Miller was surprised when Brannon called requesting to be billed for $10,001. Presumably, appellant seeks to demonstrate that Miller believed he had never reached agreement with Brannon to rig the Gillespie County bid, and that Brannon, therefore, owed appellant nothing. The record shows, however, appellant's consistent practice was to return any overage to overpaying customers. In Brannon's case Miller never instructed Rudolff not to bill Brannon and did not direct Rudolff to return the $10,001 check to Brannon.

Finally, appellant contends that one can reasonably conclude that the jury accepted appellant's version of the evidence with respect to Miller and Young because it acquitted them. No conclusion may be drawn as to how the jury viewed the evidence based on its acquittal of Miller and Young. It is well settled that "[i]n this Circuit consistency [of verdicts] is not required." *United States v. Cargo Service Stations, Inc., supra,* 657 F.2d at 685;

accord Dugan Drug Stores v. United States, 326 F.2d 835, 837 (5th Cir. 1964). Thus, it is immaterial "[w]hether the jury's verdict was the result of carelessness or compromise" or a belief that the corporation should be penalized rather than the individual defendants. "Juries may indulge in precisely such motives or vagaries," and no inferences favorable to corporate defendants should be drawn from allegedly inconsistent verdicts. *United States v. Dotterweich*, 320 U.S. 277, 279 (1943); *United States v. Cargo Service Station, Inc., supra*, 657 F.2d at 685.

It is the jury's province to judge the credibility of the witnesses. They apparently chose to believe the Brannons' testimony as to the facts surrounding the making of the agreement. Moreover, aside from the Brannons' testimony, there was evidence that appellant received and deposited the $10,001 check from Brannon Contractors. Even though some of the evidence relating to the payment was circumstantial, a jury may base its finding of the requisite intent for violation of § 1 of the Act in whole or in part upon circumstantial evidence. *United States v. Cargo Service Stations, Inc., supra*, 657 F.2d at 683 n. 5; *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 558 (5th Cir. 1980), *cert. denied*, 456 U.S. 927 (1981).

Appellant also challenges the sufficiency of the evidence on count one by making a detailed assertion that the evidence was insufficient to support a finding that the alleged conspiracy occurred in or affected interstate commerce. Section 1 of the Sherman Act prohibits conspiracies "in restraint of trade or commerce among the several states." This language has been construed by the courts to prohibit restraints that either occur in the flow of interstate commerce or that substantially affect interstate commerce. *Burke v. Ford*, 389 U.S. 320, 321 (1967); *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1082 (5th Cir.) *cert. denied*, 437 U.S. 903 (1978). Proof under either the "flow" theory or the "affect" theory is sufficient to sustain a conviction under the Act. *Battle v. Liberty National Life Insurance Co.*, 493 F.2d 39, 47 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975).

The government demonstrated that portions of U.S. Highway 290 were seal coated as part of the Gillespie County job. U.S. 290 also connects directly with Interstate Highway 10 in two

places. An average of 55 out-of-state vehicles passed over the seal-coated segment daily in 1977. Furthermore, the evidence showed that in completing the seal coat job, Brannon Contractors used heavy equipment that was purchased and delivered directly from out-of-state sources.[7] It has been held that a conspiracy to restrain trade in intrastate activity can affect trade in interstate activity sufficiently to trigger Sherman Act jurisdiction. *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 36 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972). The bidrigging conspiracy in which appellant was involved affected competition in the interstate marketing of heavy equipment because equipment suppliers were forced to bargain with a contractor who, as a result of an unlawful conspiracy, possessed a monopolistic position as a buyer or lessee of heavy construction equipment. "The focus of the [A]ct is to protect interstate trade from interferences of all degrees of subtlety." *Ibid.* As the Supreme Court has stated,"[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States v. Women's Sportswear Association*, 336 U.S. 460, 464 (1949).

Taking the view most favorable to the government, we conclude that the evidence in the aggregate amply supports a finding that the bidrigging conspiracy substantially affected interstate commerce. *See Glasser, supra*, 315 U.S. at 80. This conclusion is in keeping with the Congressional policy to exercise "the utmost extent of [Congress'] Constitutional power in restraining trust and monopoly agreements." *Gulf Oil Corp. v. Copp Paving Company, Inc.*, 419 U.S. 186, 194 (1974).

Finally, appellant challenges the sufficiency of the evidence on the mail fraud charges (counts two and three). As appellant correctly contends, the government was required to show that the mailings (relating to the billing and payment of the $10,001) were "in furtherance" of the bidrigging scheme. *United States v.*

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[7] The government was not required to prove that appellant, Young Brothers, made the purchases of equipment in interstate commerce as long as it proved that one or more other co-conspirators made such purchases. *See, e.g., United States v. Foley*, 598 F.2d 1323, 1328 (4th Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980); *United States v. Wilshire Oil Co.*, 427 F.2d 969, 974 (10th Cir.), *cert. denied*, 400 U.S. 829 (1970).

Rodgers, 624 F.2d 1303, 1309 (5th Cir. 1980), *cert. denied sub nom., Anthony J. Bertucci Construction Co. v. United States*, 450 U.S. 917 (1981); *United States v. Buchanan*, 544 F.2d 1322, 1325 (5th Cir.), *cert. denied*, 432 U.S. 907 (1977). It is appellant's position that the mailings could not have been in furtherance of the scheme since they occurred after the June 23 bid deadline.

There is no set span of time within which mailings must occur to be considered in furtherance of an illicit scheme. It is clear, however, that the mere fact that the use of the mails occurred after the bid deadline does not bar recognition that the use was in furtherance of the conspiracy. The Supreme Court has held that the mailings must be "sufficiently closely related" to the scheme. *United States v. Maze*, 414 U.S. 395, 399 (1974). It is enough that use of the mails could have been reasonably foreseen by those engaged in the scheme, or that the mailings were "incident to an essential part of the [bidrigging] scheme." *Pereira v. United States*, 347 U.S. 1, 8 (1954); *see also United States v. Shepherd*, 511 F.2d 119, 121 (5th Cir. 1975); *United States v. Knight*, 607 F.2d 1172, 1175 (5th Cir. 1979).

The $10,001 pay-off was a planned and established part of the full bidrigging scheme. Indeed, since the evidence showed that Young requested the payment, it reasonably can be inferred that Young would not have agreed to the scheme on behalf of his company without being paid. Moreover, since both Brannon and Young agreed to the fraudulent billing arrangement, and since their headquarters were geographically apart,[8] both could reasonably have foreseen that they would use the mails for the billing and the payoff.

In sum, the government's evidence showed that the use of the mails for the $10,001 payment to appellant was made in satisfaction of Brannon's obligation to compensate appellant for not bidding the job competitively. It follows that the payment was an integral part of the scheme to defraud the State. We conclude that the evidence was clearly sufficient for the jury reasonably to conclude that the mailings were in furtherance of the bidrigging scheme.

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[8] Brannon Contractors, Inc. was located in Victoria, Texas; Young Brothers, Inc., Contractors was located in Waco, Texas.

EXCLUSION OF GRAND JURY TESTIMONY

Appellant attempted to introduce at trial the grand jury testimony of Keith Allen Keller and James Kemp, employees of the Allen Keller Company. The evidence showed, as set out above, that the Allen Keller Company also conspired with Brannon to submit a non-competitive bid. In grand jury testimony, these two men denied ever talking to Brannon about rigging the bid. When appellant attempted to call Keller and Kemp as witnesses, each indicated that if called to testify he would invoke his privilege against self-incrimination. Appellant argues that this made Keller and Kemp "unavailable" as witnesses under Federal Rule of Evidence 804 (a) (1) and that the court therefore should have permitted the introduction of their grand jury testimony under the "former testimony" hearsay exception of Rule 804 (b) (1).[9] The court excluded the grand jury testimony, holding that a witness who claims the privilege against self-incrimination does not become "unavailable" so that former testimony becomes admissible under Rule 804 (b) (1).

Resolution of the issue of the admissibility of the former grand jury testimony of Keller and Kemp requires us to determine (1) whether Rule 804 (b) (1) applies to a witness who is unavailable due to his invoking the privilege against self-incrimination; (2) whether the district court was required to make a formal ruling on the validity of the privilege before a witness could be considered unavailable; and (3) once it is de-

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[9] Rule 804 (a) (1) provides:

> (a) **Definition of availability.** "Unavailability as a witness" includes situations in which the declarant—
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> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement.

Rule 804 (b) (1) provides:

> (b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness.
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> (1) **Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

termined that a witness is unavailable under 804 (a) (1), whether grand jury testimony is properly considered former testimony under Rule 804 (b) (1).

Turning to the first of these inquiries, we held in a similar situation in *United States v. Thomas*, 571 F.2d 285, 288 (5th Cir. 1978):

> Weeks did not take the stand, obviously relying on the privilege against self-incrimination. His unavailability based on the Fifth Amendment privilege satisfies 804 (a) (1).

Thus, it is clear that a witness who is unavailable because he has invoked the Fifth Amendment privilege against self-incrimination is unavailable under the terms of 804 (a) (1).

The government argues, however, that in order for a witness to be unavailable under the rule, the witness claiming the Fifth Amendment privilege must be exempted from testifying by a ruling of the court. The government contends that the appellant never tendered Keller or Kemp for questioning so that the district court could rule on the validity of their asserted privilege. In *Thomas*, we further held:

> Rule 804 (a) (1) requires an express assertion of the privilege and a ruling by the court that the privilege constitutes unavailability, *see* 4 Weinstein's Evidence ¶ 804 (a) [01] (1976), but here the existence of the privilege and Weeks' right to assert it and Weeks' unavailability as a witness are patent. The trial court declared the evidence inadmissible before reaching issues raised by Rule 804. It would be mere formalism to abjure the merits of [defendant's] claim in these circumstances. *See U.S. v. Oropeza*, 564 F.2d 316, 325 n.8 (CA 9, 1977).
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> *Ibid.*

Thus, although Rule 804 (a) (1) literally requires the court to rule upon the validity of the witness' assertion of the privilege, our ruling in *Thomas* indicates that such a requirement need not be met when its fulfillment would be a mere "formalism." It is clear from the record that the district court assumed a proper claim of the privilege had been made but held that the claim did

not render the witnesses unavailable. The court simply concluded that Rule 804 (a) (1) did not have application to unavailability because of the claim of Fifth Amendment privilege. As in *Thomas*, the "trial court declared the evidence inadmissible before reaching issues raised by Rule 804." We, therefore, conclude that it was unnecessary for the court to have ruled with more specificity as to the validity of Kemp's and Keller's asserted privilege against self-incrimination. It was clear to all participants that each claim would have been made. In fact, the government stipulated at trial that Kemp and Keller would assert their Fifth Amendment privilege if called to testify.

We decide, therefore, that Kemp and Keller were unavailable as witnesses within the meaning of Rule 804 (a) (1). This leaves us with the difficult question whether the Rule 804 (b) (1) definition of "former testimony" includes grand jury testimony. The typical situation encompassed by Rule 804 (b) (1) is testimony which was elicited in a former adversarial hearing. The importance of the former hearing being adversarial in nature is to insure that the party against whom the former testimony is offered at trial had an opportunity to confront the witnesses at the former hearing.[10] This concern is not present in this case because it was the party offering the testimony, the appellant, who had not had the opportunity to cross-examine. Appellant was waiving its right of confrontation. The party against whom the testimony was being offered at trial, the government, and an opportunity to question the witnesses fully during the grand jury hearing.

We conclude, however, that we need not decide whether the district court should have admitted the grand jury testimony under the former testimony hearsay exception. Even if the testimony should have been admitted, the error was harmless. Appellant argues that the exclusion of the grand jury testimony was harmful on the theory that Brannon could not have actually rigged the bid without eliminating all potential bidders. Therefore, the grand jury testimony would have provided evidence to

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[10] This concern is evidenced by the rule's requirement that the person against whom the evidence is offered at trial must have had an opportunity to develop the witness's testimony at the former hearing "by direct, cross, or redirect examination." *See supra* note 9.

substantiate appellant's defense posture that it had not entered into an agreement with Brannon and had no intention to defraud the State.

We reject this argument for several reasons. First, it is of great significance that the basic purport of the Keller and Kemp testimony was before the jury anyhow. The government stipulated that Kemp and Keller had appeared before the grand jury and had denied any knowlege of or participation in any type of bidrigging scheme. Second, the district court instructed the jury that since both Kemp and Keller denied participation in the bidrigging scheme, the jury was free to infer that such a scheme did not exist. This instruction was given in keeping with the appellant's right "to have [its] theory of the case, if it could amount to a lawful defense, fairly submitted to the consideration of the jury." *United States v. Flom, supra,* 558 F.2d at 1185. Most important, the evidence undisputedly showed that notwithstanding any participation or nonparticipation by Kemp and Keller, appellant made an agreement with Brannon to submit a noncompetitive bid and in return received $10,001. The evidence surely was sufficient for the jury reasonably to conclude that appellant participated in the bidrigging scheme even if the members of the jury were not convinced that Kemp and Keller had also participated. The admission of grand jury testimony under Rule 804 (b) (1) is a difficult question even when there is no confrontation issue. We do not go out of our way to decide it since in this case if there was error it was harmless.[11]

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[11] We note that the reported federal circuit court cases which have admitted grand jury testimony of an unavailable witness have all done so under 804 (b) (5). *See United States v. West,* 574 F.2d 1131, 1134 (4th Cir. 1978); *United States v. Carlson,* 547 F.2d 1346, 1353 (8th Cir. 1976), *cert. denied,* 431 U.S. 914 (1977); *United States v. Boulahanis,* 677 F.2d 586, 588 (7th Cir.), *cert. denied,* ____ U.S. ____, 103 S.Ct. 375 (1982); *United States v. Barlow* 693 F.2d 954, 961 (6th Cir. 1982) *cert. denied,* ____ U.S. ____, 103 S.Ct. 2124 (1983); *United States v. Garner,* 574 F.2d 1141, 1144 (4th Cir.), *cert. denied,* 439 U.S. 936 (1978).

Rule 804 (b) (5) provides:

> **(5) Other exceptions.** A statement not specifically covered by any of the foregoing exceptions [i.e., former testimony, statement under belief of impending death, statement against interest, or statement of personal or family history] but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered

EXCLUSION OF EXPERT TESTIMONY

Appellant contends that the district court erred in excluding the testimony of Joe Wells, an accountant, who was tendered by appellant as an expert on the question of the reasonableness of the bids submitted for the Gillespie County project. Wells purportedly would have testified that the costs involved in completing the Gillespie County job would have exceeded Gold's estimate, and that a bid of $460,000 was a reasonable bid for the job.

"The expert qualification of a witness is a question for the trial judge, whose discretion is conclusive unless clearly erroneous as a matter of law." *United States v. Crosby*, 713 F.2d 1066, 1076-77 (5th Cir.), *cert. denied*, ____ U.S. ____, 104 S.Ct. 506 (1983); *see also United States v. Johnson*, 575 F.2d 1347, 1360 (5th Cir. 1978), *cert. denied*, 440 U.S. 907 (1979). The district court was

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as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

While there is no Fifth Circuit case in which we admit grand jury testimony of an unavailable witness under 804 (b) (1) or (5), in *United States v. Thevis*, 665 F.2d 616, 627 (5th Cir.), *cert. denied*, ____ U.S. ____, 103 S.Ct. 57 (1982), grand jury testimony was offered by the government against the defendant. We found that the defendant had waived his confrontation rights because he had murdered the government's witness. We further held that Thevis's waiver of his right of confrontation also constituted a waiver of any hearsay objections. Thus, we upheld the trial court's admission of the grand jury testimony on grounds independent of the hearsay exceptions contained in Rule 804 (b). However, with regard to the issue on the admissibility of grand jury testimony under Rule 804 (b) (5), we stated generally that if grand jury testimony meets the stringent reliability standards of Rule 804 (b) (5), it is admissible even if a defendant makes no express or implied waiver of his confrontation rights. *See also United States v. Gonzales*, 559 F.2d 1271, 1273 (5th Cir. 1977) (grand jury testimony excluded because it failed to meet the reliability standards of 804 (b) (5).

We recognize that the issue of prior grand jury testimony will almost always arise under 804 (b) (5) because of the confrontation problem which, however, is not present in this case.

well within its discretion in excluding Wells's testimony on the grounds that he was not qualified to give an expert opinion on the reasonableness of bids submitted for highway construction jobs. The record shows that prior to trial Wells had never worked as a highway contracting estimator, had never done a special study of the field, and had no expertise in estimating other than what he had gained in his preparation for his trial testimony.

MOTION TO AMEND INDICTMENT

Appellant contends that the district court erred in granting the government's mid-trial motion to amend the indictment by changing "Young Brothers, Inc." to "Young Brothers, Inc. Contractors". At the time of the alleged conspiracy there was no corporation with the name "Young Brothers, Inc." There was, however, a "Young Brothers, Inc. Contractors" that had two subsidiaries, "Young Bros. Corporation" and "Young Equipment Company." Of the three, only Young Brothers, Inc., Contractors actually did highway construction work during the period in question and was qualified to enter bids for Highway Department jobs.

The form of an indictment may be amended without return to the grand jury so long as its substance remains the same. *Russell v. United States*, 369 U.S. 749, 770 (1962). A misnomer is a mistake of form which may be corrected by amending the indictment. *See, e.g., Williams v. United States*, 179 F.2d 656, 659 (5th Cir. 1950), *aff'd*, 341 U.S. 97 (1951). An amendment will be allowed if a defendant's rights are not affected and he is adequately apprised of the charges against him so that he is protected against surprise at trial or another prosecution for the same offense. *Berger v. United States*, 295 U.S. 78, 82 (1935); *United States v. Cook*, 586 F.2d 572, 575 (5th Cir. 1978), *cert. denied*, 442 U.S. 909 (1979).

The legal requirements have been satisfied in this case. As the district court found, the indictment merely corrected a misnomer. Appellant was not surprised or prejudiced by the change. Of the three companies owned by the Young brothers, Young Brothers, Inc., Contractors was the only entity set up to do highway construction work and to submit bids. It was plain,

therefore, that when the government referred to "Young Brothers, Inc." in the indictment it meant "Young Brothers, Inc., Contractors". Moreover, appellant has not shown that it was prejudiced by the change in the indictment. The district court did not err by granting the government's motion to amend the indictment.

ADMISSION OF COMPUTER-GENERATED RECORDS

Appellant also challenges the court's admission of certain computer-generated records which were kept in the regular course of the State's business.[12] Appellant contends that computer-generated records are less reliable than other kinds of business records because they depend upon the accuracy of the software as well as the person feeding the raw data into the computer. Apparently, appellant would have the government tender the software programmer to overcome this asserted "double hearsay" problem.

The admissibility of business records as an exception to the hearsay rule is governed by Rule 803 (6) of the Federal Rules of Evidence. Under Rule 803 (6), computer data compilations may be business records. They are admissible when the requirements for laying a proper foundation for their admissibility have been met. *United States v. Vela,* 673 F.2d 86, 90 (5th Cir. 1982); *Rosenberg v. Collins,* 624 F.2d 659, 665 (5th Cir. 1980); *United States v. Fendley,* 522 F.2d 181, 187 (5th Cir. 1975).

"Any person in a position to attest to the authenticity of certain records is competent to lay the foundation for the admissibility of the records; he need not have been the preparer of the record, nor must he personally attest to the accuracy of the information contained in the records." *Rosenberg, supra,* 624 F.2d at 665. This rule applies to computer-generated business records as well as to other types of business records. *Ibid; United States v. Vela, supra,* 673 F.2d at 90; *United States v. Fendley, supra,* 522 F.2d at 187. It is undisputed that the records in question where maintained by the State in the course of its regularly conducted business activities. The documents were of-

---

[12] Five of the computer-generated records were used to prove the conspiracy affected interstate commerce, and two were used to prove the actual amounts of the bids on the Gillespie County job.

fered into evidence through the testimony of the state official responsible for their custody, who testified as to their authenticity. It is clear that a proper foundation was laid for the admission of the records.

"The trial court has broad discretion in ascertaining the admissibility of business records, and its ruling should be disturbed only when that discretion is abused." *Rosenberg, supra,* 624 F.2d at 665. The trial judge correctly admitted into evidence the computer-generated business records.

REQUESTED JURY INSTRUCTIONS

Finally, appellant contends that the district court erred in refusing to instruct the jury (1) that the reasonableness of a bid may be taken into account in considering whether the bid was the result of an unlawful agreement; (2) that the reasonableness of appellant's bid could be considered on the question of appellant's intent to defraud the State of Texas; and (3) that if the jury found the alleged activities to be wholly intrastate, then it also was required to find that the activities directly and substantially affected interstate commerce.

A court is not required, however, to charge the jury in the precise form and language requested by the parties. *See, e.g., United States v. Southers,* 583 F.2d 1302, 1308-09 (5th Cir. 1978). "Once the judge has made an accurate and correct charge, the extent of its amplification must rest largely in his discretion." *United States v. Bayer,* 331 U.S. 532, 536 (1947). Moreover, a single jury instruction may not be judged in isolation but must be viewed in the context of the overall charge and the entire trial. *United States v. Park,* 421 U.S. 658, 674-675 (1975); *Cupp v. Naughten,* 414 U.S. 141, 146-147 (1973).

Our review of the record indicates that the jury instructions given by the trial judge were adequate and did not require amplification. Moreover, appellant failed to object to the court's refusal to give the requested instruction on interstate commerce. We reject appellant's contention that the court's ruling on this instruction was plain error.

We find that the trial court committed one error which was harmless. Other assertions of error fail. Appellant was given a fair trail, and the convictions by the jury were proper.

AFFIRMED.

APPENDIX 2

April 5, 1984

Mr. Gilbert F. Ganucheau
Clerk
U.S. Court of Appeals for
the Fifth Circuit
Room 102 - 600 Camp Street
U.S. Court of Appeals Courthouse
New Orleans, Louisiana 70130

Re: United States v. Young Brothers, Inc.
Contractors, 5th Cir., No. 83-1174

Dear Mr. Ganucheau:

We wish to bring to the Court's attention some statements made by the Court in its March 19, 1984 decision, affirming the convictions in the above case, that the Court may wish to clarify or correct.

First, at p. 19 of the Slip Opinion, the Court states that:

> First, it is of great significance that the basic purport of the Keller and Kemp testimony was before the jury anyhow. The government stipulated that Kemp and Keller had appeared before the grand jury and had denied any knowledge of or participation in any type of bidrigging scheme. Second, the district court instructed the jury that since both Kemp and Keller denied participation in the bidrigging scheme, the jury was free to infer that such a scheme did not exist. This instruction was given in keeping with the appellant's right "to have [its] theory of the case, if it could amount to a lawful defense, fairly submitted to the consideration of the jury." *United States v. Flom, supra,* 558 F.2d at 1185.

The record shows that while the government did orally stipulate that Keller and Kemp "appeared before the grand jury and denied any knowledge of any type of bid-rigging in the State of Texas" (R.T. 1127), this stipulation was made in chambers (R.T. 1119), outside the presence of the jury (R.T. 1140), and was

never communicated to the jury. Moreover, the district court never instructed the jury, as is stated at p. 19 of the Slip Opinion, that "since both Kemp and Keller denied participation in the bidrigging scheme, the jury was free to infer that such a scheme did not exist." Consistent with the record, the government's brief in this case did not argue that the stipulation was read to the jury (the stipulation was not mentioned in the brief) or refer to any jury instruction that discusses the grand jury testimony of Kemp and Keller. We did note in the brief (pp. 56, 25 n.25) that the district court instructed the jury on defendants' theory generally, that "none of them [the defendants] knowingly and willfully entered into any agreement . . . to defraud the State of Texas . . . (R.T. 1273-74) or "to submit collusive" bids (R.T. 1264).

While the testimony of Keller and Kemp was not presented to the jury, the Court was still correct in concluding that the exclusion of this testimony was, at worst, harmless error. The record fully supports the point identified by the Court as "most important", namely that "notwithstanding any participation or non-participation by Kemp and Keller, appellant made an agreement with Brannon to submit a non-competitive bid and in return received $10,001" (Slip Opinion 19). Thus, we believe the Court correctly concluded that the "evidence surely was sufficient for the jury reasonably to conclude that appellant participated in the bidrigging scheme even if the members of the jury were not convinced that Kemp and Keller had also participated" (*Id.* at 19-20). Therefore, the Court properly affirmed appellant's conviction.

Second, the Court states, at pp. 18-19 of the Slip Opinion, that " . . . [W]e need not decide whether the district court should have admitted the grand jury testimony under the hearsay exception. Even if the testimony should have been admitted the error was harmless." Again, on p. 20, the Court states: "The admission of grand jury testimony under Rule 804 (b) (1) is a difficult question even when there is no confrontation issue. We do not go out of our way to decide it since in this case if there was error it was harmless. (footnote omitted)" On p. 25 of the Slip Opinion, however, the Court states: "We find that the trial court committed one error which was harmless." Thus, assuming that the Court on p. 25 was referring to the grand jury testimony

issue, its comment that the district judge had committed harmless error in excluding the testimony would appear to be inconsistent with its earlier statements that it need not decide whether the district court had erred in excluding the testimony. The Court may wish to clarify whether it in fact decided whether the testimony was properly excluded.

Finally, we note that the correct punctuation for the defendant's name, as indicated in the indictment and in the articles of incorporation, is "Young Brothers, Inc. Contractors", omitting the second comma between "Inc." and "Contractors" (see Gov. Br. 47). The covers of Appellant's and Appellee's briefs and the Court's Slip Opinion (pp. 1, 22) include the second comma.

Sincerely yours,

Frederic Freilicher
Attorney
Appellate Section
Antitrust Division

cc: Counsel of Record

APPENDIX 3

April 23, 1984

TO ALL COUNSEL OF RECORD:

No. 83-1174 - U.S.A. v. YOUNG BROTHERS, INC., CONTRACTORS

(OPINION RENDERED 3/19/84; SLIP PAGE 2898)

Dear Counsel:

The referenced slip opinion has been corrected at p. 2909, right-hand column, paragraph two. The first three sentences in this paragraph now read as follows:

> "We reject this argument. First, the government stipulated that Kemp and Keller had appeared before the grand jury and had denied any knowledge of or participation in any type of bidrigging scheme. Second, the district court instructed the jury on appellant's defensive theory — "that none of [the defendants] knowingly or willfully entered into any agreement or any scheme or artifice to defraud the State of Texas" or "submit collusive, non-competitive highway construction bids."

West Publishing Company has been notified.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By_____
Deputy Clerk

/cfs

cc Messrs. Frank Maloney
David L. Botsford
Messrs. Frederic Freilicher
John J. Powers, III

APPENDIX 4

April 27, 1984

Mr. Gilbert Ganucheau
Office of the Clerk
U.S. Court of Appeals
600 Camp Street
New Orleans, LA 70130

Re: No. 83-1174, U.S.A. v. Young Brothers Inc., Contractors

Dear Mr. Ganucheau:

On March 19, 1984, a Panel of this Court delivered an opinion in the above cause.

On or about March 30, 1984, the Appellant timely filed a motion for panel rehearing and a suggestion for rehearing en banc.

Although we have not received notice of the disposition of those motions, we have received a letter from your office, dated April 23, 1984, reflecting corrections in the original slip opinion. A copy of that letter is attached hereto for purposes of convenience.

Based on the corrections to the first *three* sentences of the second paragraph of the right hand column of p. 2909 of the slip opinion, as indicated by your letter of April 23, 1984, that paragraph now reads as follows:

> "We reject this argument. First the government stipulated that Kemp and Keller had appeared before the grand jury and had denied any knowledge of or participation in any type of bidrigging scheme. Second, the district court instructed the jury on appellant's defensive theory —"that none of [the defendants] knowingly or willfully entered into any agreement or any scheme or artifice to defraud the State of Texas" or "submit collusive, non-competitive highway construction bids." Second, the district court instructed the jury that since both Kemp and Keller denied participation in the bidrigging scheme, the jury was free to infer that such a scheme did not exist. This instruction was given in keeping with the appellant's right "to have [its]

theory of the case, if it could amount to a lawful defense, fairly submitted to the consideration of the jury." United States v. Flom, supra, 558 F.2d at . . . "

As corrected, the above paragraph is not only nonsensical, it fails to eliminate the gross factual inaccuracies pointed out in Appellant's Motion For Panel Rehearing at paragraphs III and IV, a copy of which is attached hereto for purposes of convenience.

Since this matter is pending on rehearing before the Panel and the full Court, we have enclosed twenty-two copies (15 for en banc and 7 for panel) of this letter for distribution to the Court.

Your cooperation in this matter will be greatly appreciated.

Sincerely yours,

_____

Frank Maloney

_____

David L. Botsford

FM/pgj

Enclosures

cc: Frederic Freilicher

John L. Powers, III

APPENDIX 5

May 3, 1984

TO ALL COUNSEL OF RECORD:

No. 83-1174 - U.S.A. v. YOUNG BROTHERS, INC., CONTRACTORS

(OPINION RENDERED 3/19/84; SLIP PAGE 2898)

Dear Counsel:

Due to an error in the clerk's office, the letter from this office dated April 23, 1984, did not accurately reflect the changes made by the Court. The paragraph referenced in that letter (slip opinion at p. 2909, right-hand column, paragraph two) reads in total as follows:

> We reject this argument. First, the government stipulated that Kemp and Keller had appeared before the grand jury and had denied any knowledge of or participation in any type of bidrigging scheme. Second, the district court instructed the jury on appellant's defensive theory — "that none of [the defendants] knowingly or willfully entered into any agreement or any scheme or artifice to defraud the State of Texas" or "to submit collusive, noncompetitive highway construction bids." This instruction was given in keeping with the appellant's right "to have [its] theory of the case, if it could amount to a lawful defense, fairly submitted to the consideration of the jury." *United States v. Flom, supra*, 558 F.2d at 1185. Most important, the evidence undisputedly showed that notwithstanding any participation or nonparticipation by Kemp and Keller, appellant made an agreement with Brannon to submit a noncompetitive bid and in return received $10,001. The evidence surely was sufficient for the jury reasonably to conclude that appellant participated in the bidrigging scheme even if the members of the jury were not convinced that Kemp and Keller had also participated. The admission of grand jury testimony under Rule 804(b)(1) is a difficult question even when there is no confrontation issue. We do not go out of our way to decide it since in this case if there was error it was harmless.[11] [footnote omitted in this printing.]

TO ALL COUNSEL OF RECORD
No. 83-1174 - USA v. YOUNG BROTHERS, INC., CONTRACTORS

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By_____
Deputy Clerk

/cfs

cc Messrs. Frank Maloney
David L. Botsford
Messrs. Frederic Freilicher
John J. Powers, III

APPENDIX 6

May 21, 1984

TO ALL PARTIES LISTED BELOW:

No. 83-1174 - U.S.A. v. YOUNG BROTHERS, INC., CONTRACTORS

Dear Counsel:

The enclosed order has this day been entered on petition ( ) for rehearing.

See Rule 41, F.R.A.P. and Local Rule 41 for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By_____
Deputy Clerk

cc and enclosure to:

cc Messrs. Frank Maloney
David L. Botsford
Messrs. Frederick Frilicher
John J. Powers, III

UNITED STATES v. YOUNG BROS., INC. **3855**

UNITED STATES of America,
Plaintiff-Appellee,

v.

YOUNG BROTHERS, INC., Contractors,
Defendant-Appellant.

No. 83-1174.

United States Court of Appeals,
Fifth Circuit.

May 21, 1984.

Appeal from the United States District
Court for the Western District of Texas.

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING
EN BANC

(Opinion March 19, 5th Cir. 1984, 728
F.2d 682)

Before BROWN, REAVLEY and WILLIAMS, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

To correct a factual error in the run-on paragraph, slip op. 2909-10, 728 F.2d 691-92, the wording has been amended to read:

> We reject this argument. First, the government stipulated that Kemp and Keller had appeared before the grand jury and had denied any knowledge of or participationin any type of bidrigging scheme. Second, the district court instructed the jury on appellant's defensive theory — "that none of [the defendants] knowingly or willfully entered into any agreement or any scheme or artifice to defraud the State of Texas" or "to submit collusive, noncompetitive highway construction bids." This instruetion was given in keeping with the appellant's right . . .

Further, the first sentence of the last paragraph of the opinion, slip op. 2913, 728 F.2d 694, has been reworded to read:

> We find that the trial court may have committed one error which was harmless.

Office-Supreme Court, U.S.
FILED
SEP 10 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-39

In the Supreme Court of the United States

OCTOBER TERM, 1984

YOUNG BROTHERS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

CHARLES F. RULE
Deputy Assistant Attorney General

JOHN J. POWERS, III
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Washington, D.C. 20530
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12 pp

QUESTION PRESENTED

Whether, in the circumstances of this case, the district court's refusal to permit petitioner to introduce into evidence the prior grand jury testimony of two witnesses who refused to testify at trial was harmless error.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-39

YOUNG BROTHERS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-1 to 1-18) as amended (Pet. App. 6-2) is reported at 728 F.2d 682.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1984. A petition for rehearing was denied on May 21, 1984 (Pet. App. 6-1 to 6-2). The petition for a writ of certiorari was filed on July 17, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULE INVOLVED

Rule 804 of the Federal Rules of Evidence provides, in pertinent part:

> **(b) Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

> **(1) Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered * * * had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

STATEMENT

In an indictment filed in the United States District Court for the Western District of Texas in November 1981, petitioner Young Brothers, Inc., petitioner's vice-president, John W. Miller, and Brannon Contractors, Inc., were charged with one count of conspiracy to rig bids for a road resurfacing project in Gillespie County, Texas, in violation of Section 1 of the Sherman Act (15 U.S.C. 1) and two counts of related mail fraud (18 U.S.C. 1341) (Pet. App. 1-4). Petitioner's president, Francis M. Young, was separately indicted for the identical offenses in March 1982 (*id.* at 1-5).

The two indictments were consolidated and tried to a jury in November 1982.[1] The jury acquitted both Miller and Young but convicted petitioner on all counts. Petitioner was fined $750,000 for the Sherman Act offense and $1,000 for each of the two mail fraud offenses.

1. Petitioner does not challenge the sufficiency of the evidence presented against it at trial. Briefly, the evidence established that W.J. Brannon, Sr. of Brannon Contractors contacted potential bidders for the Gillespie County job prior to the letting and persuaded those companies that

---

[1]Prior to trial, Brannon Contractors was convicted pursuant to its plea of guilty to the Sherman Act count, and was fined $150,000. In accordance with the plea agreement, the district court dismissed the mail fraud counts against Brannon. As part of the agreement, the company also paid the State of Texas $500,000.

expressed interest in the project to submit "complementary bids."[2] He then contacted Miller, informed him that he "had everyone off the job" and asked Miller not to submit a competitive bid. Because Miller had been instructed by Young to submit a competitive bid, Brannon negotiated directly with Young by telephone. Young told Brannon that he (Young) "needed to make some money" and would refrain from submitting a competitive bid in exchange for $10,000.[3] Brannon agreed to pay Young $10,000 plus some "odd dollars" not to bid the job competitively and told Young to bill him for "rental equipment." Prior to the bidletting, Brannon's son gave Miller the figures he needed to turn in a complementary bid. Pet. App. 1-3 to 1-4.

Pursuant to the scheme, Brannon Contractors submitted the lowest bid and was awarded the contract, earning a profit of $135,000. After the bidletting, Brannon's son instructed petitioner's controller to send Brannon an invoice for $10,001 for equipment rental. When it received the invoice, Brannon Contractors sent a check for $10,001 to petitioner even though Brannon had not rented the equipment described in the invoice from petitioner. Petitioner deposited the check in its bank. Pet. App. 1-4.

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[2]A "complementary bid" is an intentionally high bid submitted pursuant to a collusive agreement between at least two bidders. The purpose of a complementary bid is to deceive the bidding authority into believing that it is receiving competitive bids. Pet. App. 1-3.

[3]Petitioner's interest in the Gillespie County job was based on a prior agreement with Gold Paving Aggregate, Inc. Gold wanted the job but was not qualified to bid on it under Texas Highway Department regulations. Petitioner agreed to submit a bid for the job and, if the bid was successful, to subcontract the work to Gold. Pet. App. 1-2. However, the bid eventually submitted by petitioner was more than $50,000 above Gold's original estimate (*id.* at 1-3).

Petitioner did not present any evidence contradicting Brannon's testimony concerning his agreement with Miller and Young.[4] Rather, its defense was that Miller and Young had only pretended to agree and therefore lacked the requisite intent to violate the Sherman Act. Pet. App. 1-5. It also attempted to call as witnesses Keith Keller and James Kemp of the Allen Keller Company who, in their grand jury testimony, had denied that they discussed rigging bids on the Gillespie County job with Brannon. When these witnesses indicated that, if called to testify, they would invoke their Fifth Amendment privilege against self-incrimination, petitioner attempted to introduce their grand jury testimony as former testimony pursuant to Fed. R. Evid. 804(b)(1). Pet. App. 1-11. The district court sustained the government's objection to the introduction of the grand jury transcripts (Tr. 1128-1129).

2. The court of appeals unanimously affirmed petitioner's conviction (Pet. App. 1-1 to 1-18). With respect to the district court's exclusion of the transcripts of Keller's and Kemp's grand jury testimony, the court of appeals expressly declined to decide whether such grand jury testimony was admissible pursuant to Rule 804(b)(1). Rather, the court held that even if the testimony were admissible, any error in excluding it was harmless because "the evidence undisputedly showed that notwithstanding any participation or nonparticipation by Kemp and Keller, [petitioner] made an agreement with Brannon to submit a noncompetitive bid and in return received $10,001." Pet. App. 1-14.

ARGUMENT

The decision of the court of appeals on the fact-bound harmless error issue is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

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[4]Miller and Young did not testify at trial (Pet. App. 1-3 n.4).

Petitioner contends (Pet. 9-10) that its due process rights were violated because the court of appeals' finding of harmless error was based on a fact not of record — viz., that the jury was aware of a government stipulation that Keller and Kemp had appeared before the grand jury and had denied any knowledge of bidrigging. Although the court of appeals' initial opinion mistakenly stated that the jury was aware of the stipulation (see Pet. App. 1-14), the court corrected this misstatement in its opinion after both petitioner and the government informed the court of its error (see Pet. App. 6-2). As corrected, the court's opinion merely refers to the stipulation but does not assert that the jury was aware of it (*ibid.*). Moreover, the court of appeals' corrected opinion, like its initial opinion, makes clear that the finding of harmless error was based on Brannon's undisputed testimony concerning his illegal agreement with Miller and Young and the payment of $10,001 in exchange for petitioner's noncompetitive bid. Thus, the court's factually correct reference to the stipulation could not have denied petitioner due process.

Petitioner also argues (Pet. 10-11) that the court of appeals "failed to identify which standard of harmless error" it applied. But petitioner does not state what standard of harmless error it believes the court of appeals should have applied, nor does petitioner even assert that its conviction would have to be reversed if the court had applied whatever standard petitioner believes is correct. Moreover, the evidence of petitioner's guilt was essentially undisputed and overwhelming. Thus, under any harmless error standard the exclusion of the grand jury testimony at issue in this case was harmless. See generally *United States* v. *Hasting*, No. 81-1463 (May 23, 1983).[5] Because the court of appeals

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[5]Any agreement to rig bids is a per se violation of the Sherman Act. *United States* v. *Flom*, 558 F.2d 1179, 1183 (5th Cir. 1977). In this case, Brannon's testimony about his bidrigging agreement with petitioner is

was correct in its finding of harmless error, there is no occasion for this Court to consider petitioner's additional contention (Pet. 11-15) — on which the court of appeals did not rule — that the grand jury testimony of Keller and Kemp was "former testimony" within the meaning of Fed. R. Evid. 804(b)(1), and therefore should have been admitted into evidence.[6]

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undisputed and, by itself, sufficient to sustain petitioner's conviction. The grand jury testimony of Keller and Kemp did not involve Brannon's agreement with petitioner. Rather, they simply denied that they had agreed with Brannon to rig bids. Such testimony does not exculpate petitioner and petitioner has never explained how the fact that another firm bid competitively for the Gillespie County job substantiates its defense that it merely feigned agreement with Brannon and did not intend to rig bids. The government is certainly not required to prove that the participants in a bidrigging conspiracy agreed to rig bids with all possible bidders. Cf. *United States* v. *Metropolitan Enterprises, Inc.*, 728 F.2d 444, 447-448 (10th Cir. 1984). Petitioner also suggests (Pet. 4 n.2) that it could have used the grand jury testimony to impeach Brannon. But petitioner expressly told the court of appeals that the testimony was not offered for its impeachment value (C.A. Reply Br. 11). In any event, since the grand jury testimony involved only the collateral issue of whether Brannon had conspired with Keller and Kemp, its impeachment value with respect to Brannon's conspiracy with petitioner was limited at best.

[6]In any event, we note that, contrary to petitioner's suggestion (Pet. 11), whether grand jury testimony is admissible against the government under Rule 804(b)(1) does not depend simply on whether it can be classified as "former testimony." Rather, under Rule 804(b)(1), former testimony is inadmissible unless "the party against whom the testimony is now offered * * * had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." There are several reasons why government counsel may not wish to develop further the grand jury testimony of a witness who denies any knowledge of illegal activity. For example, government counsel might believe that the evidence the grand jury is seeking is available from other sources, the testimony denying knowledge may be given at an early stage of the investigation before the government has obtained information with which it could effectively challenge the witness, or the broad scope of an investigation may preclude questioning each witness until the government and the grand jury are satisfied that the witness is either telling the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

CHARLES F. RULE
Deputy Assistant Attorney General

JOHN J. POWERS, III
GEORGE EDELSTEIN
Attorneys

SEPTEMBER 1984

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truth or committing perjury. Moreover, grand jury witnesses are not barred from disclosing their testimony. Fed. R. Crim. P. 6(e). Accordingly, government counsel may not wish to reveal to a witness the evidence that the grand jury has already obtained and thus risk that the witness will warn potential defendants of the scope of the grand jury's investigation.

In this case, the government attorney assisting the grand jury in its investigation simply had no reason to develop further the testimony of Keller and Kemp once they denied knowledge of bidrigging. They testified in the early stages of the investigation before the evidence establishing that bids were rigged on the Gillespie County job had been fully developed. And once the grand jury finished hearing the testimony of the approximately 170 witnesses who followed Keller and Kemp, there was no need to recall the latter two witnesses to question their earlier testimony, particularly when that testimony did not undermine the evidence establishing a bidrigging conspiracy between petitioner and Brannon.

DOJ-1984-09